

CITY AND COUNTY OF SAN FRANCISCO



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VIA E-MAIL

Michael Massey
Assistant Regional Counsel
United States Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Yosemite Creek Superfund Site, San Francisco, CA

Dear Mr. Massey:

We write on behalf of the City and County of San Francisco (the "City") in response to the United States Environmental Protection Agency's ("EPA") further questions as communicated to me during our telephone conversation on December 4, 2008, and confirmed in your email to me on the same date. Specifically, EPA has asked for information about (1) the City's enforcement authority against persons "illegally or improperly" discharging waste into the City's sewer system and (2) the interim measures implemented by the City to "address (reduce/limit/control/treat) discharges of hazardous substances to its sewer system during the time between identification of sewer overflows as a potential environmental problem (circa 1967) and the time that the City began operation of the storm water retention/storage boxes." You have asked that the City provide this information to EPA by the close of business today.

Answers to both questions are found in the City's Industrial Waste Program, established by Industrial Waste Ordinance Nos. 15-71 and 199-77, enacted in January 1971 and June 1977, respectively. We discussed these ordinances in our November 21, 2008 letter and provide further details here.

Before we turn to the City's Industrial Waste Program, it is important briefly to remind EPA of what was known at the time –by the City, the Regional Board and EPA – about the constituents of combined sewer overflows ("CSO"). It is critical for EPA to keep in mind that the "due care" component of CERCLA's third party defense requires only that the City's conduct with respect to CSOs be evaluated based on what a similarly situated municipal sewer operator would have done in light of all the relevant facts and circumstances. Once the City's conduct is examined with regard to the state and federal regulatory requirements existing at the time, as well as the efforts by combined sewer system operators across the country to control CSOs, EPA can arrive at no other conclusion but that the City will prevail on its third party defense.

I. The Principal Threats Believed to be Posed By CSOs in the 1970s Were Bacteriological and Related to "Aesthetic Pollution"

When the City first began evaluating CSOs from its sewer system (circa the mid-1960s), it was not known that "hazardous" (as we understand that term now) chemicals were present in the overflows. In connection with the 1971 master planning process, the City determined that, in an average year, CSOs occurred 82 times for a total of 205 hours (less than 9 days out of a year), with a total volume of 6 billion gallons. San Francisco Master Plan for Waste Water

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Management, Preliminary Summary Report, prepared by Department of Public Works, September 15, 1971, at I-8 ("Preliminary Summary Report"), previously provided to EPA in connection with the City's November 21, 2008 submission.

The Comprehensive Report shows that such overflow causes the emission of 42 million lbs. of suspended solids, 11 million lbs. of grease and nearly 5 million lbs. of phosphates. The cost for corrective action is dependent on the desired reduction of these parameters.

Id. at I-8 – I-9. As shown in a table comparing total emissions from CSOs during an average year with primary treated effluent during the 1969-1970 fiscal year, emissions from CSOs represented a small percentage of total discharges into the sewer system, with the exception of suspended solids and floatables. *Id.* at VI-2.

But the perceived harm caused by releases of suspended solids and floatables back in 1971 is not the same harm from the Yosemite Creek contaminants of concern ("COCs") the EPA is concerned about today. Based on the relevant facts and circumstances that were known at the time, releases of suspended solids and floatables during wet weather events were viewed by both the City and its state and federal regulators as related to "aesthetic pollution such as materials of sewage origin found on the shoreline and receiving water discoloration." *Id.* at VI-2 – VI-3. Moreover, the parties were concerned about the "bacteriological quality of the water as related to water contact sports standards." In fact, bacterial contamination in the Bay following storm events was a matter of great concern to both the City and the regulatory agencies:

It is estimated that the existing overflows result in about 171 days of non-compliance in the receiving waters with existing standards. This is probably the most significant factor relative to combined overflow pollution that will be reduced by implementation of the Master Plan system.

Id. at VI-2 – VI-3 (emphasis added).

Hence, when the City commenced its Master Planning activities in the early 1970s, there was no understanding or knowledge by the City, or articulated concern by the state or federal governments, that CSOs contained hazardous chemicals such as the Yosemite Creek COCs. Indeed, the City's view of the hazards of CSOs was consistent with the EPA's views on CSOs, as set forth in Section I of the City's November 21, 2008 submission.

II. The City's Regulatory Authority Respecting Industrial Waste Dischargers

This notwithstanding, the City was aware of the threats posed by "waste toxicity" from its sewer effluent to the health of the San Francisco Bay. Although the laboratory detection capabilities for toxicity at the time were crude and led in a wide range of results, the City recognized that toxicity could be "immediate or acute in nature, resulting in instantaneous kills of aquatic life, or it can be long-term or chronic which results in a buildup of toxic substances in marine life over a period of years with an accompanying slow and subtle adverse effect." Preliminary Summary Report, X-8. Likewise, the Regional Board considered the "toxicity effect" on receiving waters to be a significant item to be restricted via the City's sewer discharge permits. *Id.* at IV-7.

As the City explained in the Preliminary Summary Report for the 1971 Master Plan, "toxicity, whether caused by heavy metals or pesticides discharge or by other chemical constituents, singularly, or in combination, creates a treatment problem that can not be satisfactorily solved with first or second level treatment." *Id.* at X-9. After considering treatment options to address the "toxic effects of industrial discharges," the City concluded,

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"source control represents a more feasible approach to the control of many toxicants."¹ It was for this purpose that in January 1971 "the City passed one of the most rigid industrial waste ordinances in the country, together with a supplemental appropriation to provide the necessary funding to initiate the program."²

This new law, Ordinance 15-71 (later amended in 1977 by Ordinance 199-77)³, provided the City's primary authority for the regulation of industrial discharges to its sewer system during the 1970s and 1980s. The goals of the 1971 Ordinance (discussed in our November 21 letter) included (1) the prohibition of discharge of certain materials that were known at the time to be hazardous, such as radioactive materials and flammable materials; (2) the restriction through numerical limits of other materials such as chemical oxygen demand (COD), suspended solids, grease and toxicity; (3) the assessment of charges to ensure that industry paid its fair share of the City's treatment costs; and (4) creation of a comprehensive program for identification and classification of dischargers, self-monitoring and evaluation, penalties for noncompliance, and the need for public information. See, e.g., S. Myron Tatarian, Robert C. Levy, *Annual Report, San Francisco Industrial Waste Program for Calendar Year 1974* ("1974 IWP Annual Report"), pp. II-3 and II-4 (a copy of which is provided electronically with this letter).

In drafting the 1971 Ordinance, the City endeavored to design a Pretreatment Program that paralleled the Regional Board's requirements for the City's wastewater treatment plants, a pretreatment program that was implemented three years before the City's first NPDES permits under the Clean Water Act. Indeed, the substances prohibited by the 1971 Ordinance were very similar to the waste discharge requirements considered by the Regional Board for the City's treatment plants in 1971.⁴ The 1971 Ordinance established certain numerical industrial pretreatment standards, i.e., pH, phenols, dissolved sulfide, temperature, turbidity, and toxicity (as measured using a bioassay).⁵ However, the ordinance specified the City could require dischargers to control any substance, which could cause the City's discharge from its treatment plant to exceed state or federal regulations "for which no specific limit has been established shall not exceed the concentration of said substance in Normal Raw Sewage."⁶

As new standards were developed by the state and federal regulatory agencies, the City modified its source control program to meet them. A good example is the City's response to regulatory limits on heavy metals discharged from the City's treatment plants. As reported in the Industrial Waste Program's Annual Report for 1975, City studied industrial discharges of certain metals and concluded that discharge limitations would be required for these constituents to enable the City to meet its NPDES permits.⁷ As a result, in March 1976 the City adopted Order

¹ Preliminary Summary Report, p.X-9.

² *Id.*, p.X-10.

³ Copies of the 1971 and 1977 Ordinances were provided to EPA in connection with the City's November 21, 2008 letter.

⁴ For example, the Regional Board required numerical limits on the City with respect to (a) Dissolved Oxygen, (b) Dissolved Sulfides, (c) Bacterial Value of Receiving Water, (d) Turbidity, (e) pH (acidity), (f) Settleable Matter, (g) Lead, (h) Copper, (i) Grease, and (j) Toxicity Effect on Receiving Water. Preliminary Summary Report, p. IV-7.

⁵ *Id.*, §122.

⁶ *Id.*, §122.1.

⁷ This information is derived from the 1975 annual report for the industrial waste program. This report was not electronically available at the time this letter was sent. The City will provide a copy of it to EPA upon request.

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No. 104,407. City and County of San Francisco, Department of Public Works, Order No. 104,407. March 3, 1976. p.1. This new order added requirements, "that all industries discharging significant amounts of heavy metals" make improvements in housekeeping and minimize or eliminate the discharge of such heavy metals into the sewer system. *Id.* In the same order, the City proscribed specific numerical limits of 5 mg/l for the discharge of total chromium into the sewer system. *Id.*

Referencing your specific question, the 1971 Ordinance provided an escalating series of steps to bring dischargers into compliance, culminating with the authority to plug the offender's sewer connection. The progression of enforcement actions required a public hearing for passing orders requiring dischargers to comply with the Ordinance.⁸ The orders could include: establishing specific discharge requirements; limiting amounts of discharger; requiring implementation of a self-monitoring program; and/or establishing time schedules for compliance.

In addition, the 1971 Ordinance established that violations were misdemeanors that could result in fines or imprisonment.⁹ Further, if progress towards compliance was deemed inadequate, after written notice 30-days in advance, the Director had the authority "to sever or plug the connection from the Discharger's side sewer...or cause the water service to the premises of the Discharger to be shut off."¹⁰ Lastly, the ordinance established authority for the District Attorney to take necessary legal proceedings to abate violations.¹¹

Even before the industrial source control program of the 1970s, the City was conducting self-initiated inspections of industrial dischargers in the 1960s.¹² Following passage of the 1971 Ordinance, the implementation of the City's program to reduce, limit and control discharges of hazardous substances to its sewer was expanded to include: inspecting as many industries as possible, bring to hearings those industries found to be in violation, and enforcing orders with time schedules for compliance. 1974 IWP Annual Report, p. III-1.¹³

As reported by the City in December 1974, the emphasis of the program in 1973 was the collection and analysis of Waste Discharge Reports, as well as prioritization of inspections by industrial groups. In 1974, the program focused on inspecting as many industries as possible. For example, in 1974 alone, just three years after passage of the industrial waste ordinance, the City conducted 2,640 inspections of the 2,195 industrial dischargers identified to date. *Id.*, p. III-9. The City's enforcement efforts that year resulted in 238 hearings and issuance of 229 orders

⁸ City and County of San Francisco, San Francisco Municipal Code, Section 1. Part II, Chapter X, Article 4.1, Industrial Waste Discharge Regulations as amended by Ordinance 15-71, January 25, 1971. (Ordinance 15-71). Section 123.2.

⁹ *Id.*, §126.2.

¹⁰ *Id.*, §123.4.

¹¹ *Id.*, §126.5.

¹² Department of Public Works, Inter-Bureau Memo, Bedini Bros. Drum Co, October 10, 1963.p.1

¹³ We previously provided EPA with a copy of the City's Annual Report on the Industrial Waste Program's Activities in 1973. We attach a copy of the 1974 annual report with this letter. These reports are instructive in showing the breadth of the work undertaken by the City to implement the program. However, as we cautioned above, these reports provide only snapshot of the City's efforts. We would be happy to provide EPA with a more comprehensive discussion of the Industrial Waste Program if requested.

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for compliance. *Id.*, p. III-19. And, in 1975, the pace of the program accelerated even more, with more than 400 orders for compliance issued.¹⁴

As exemplified by its efforts at the former Bay Area Drum (BAD) site, the City's industrial waste source control enforcement program continued through the 1980s and included follow up inspections, issuance of orders and ultimately, issuance of cease and desist orders. During the 23 years of monitoring BAD's activity, the City conducted over 25 inspections, conducted surveillance waste sampling and issued three orders to take actions to bring the discharge in compliance. Through these actions the City was able to get BAD to take corrective measures such as installing a closed system to contain and recycle its caustic solution and reducing the discharge to clear water used for washing down the floor once or twice a week.¹⁵ Despite the relatively low volume of wastewater from BAD, the City pursued a cease and desist order after they had failed to install an effective pretreatment system.¹⁶ The City also issued three other cease and desist orders the same year.¹⁷ It bears repeating that the only discharge violations detected by City inspectors at the site were occurrences of high pH and chromium, neither of which is an issue at Yosemite Creek..

III. The City's Brief Response to the PRP Group's Comment Letter Received Today

This afternoon we received another letter from the PRP Group purporting to establish the City's status as a PRP. While we have not had sufficient time to specifically respond to the mischaracterizations and innuendo provided in this letter, we offer the following summary comments that are supported by the record. We will respond in detail, in accordance with a schedule you determine is appropriate.

The PRP Group grossly mischaracterizes the City's efforts to improve its sewer system and San Francisco Bay, misapplies the appropriate standard for determining a third party defense, and apparently applies state of the art contamination characterization standards to events that occurred three to four decades ago, all in an effort to cast this municipal sewage agency as equally culpable as the numerous entities whose complete mismanagement of their operations has already been conclusively determined. The City's record amply demonstrates that it "took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all the relevant facts and circumstances." *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1276 (E.D.Cal. 1997). In fact, the City undertook prudent and very expensive actions, well in advance of EPA's emerging regulatory role.

For instance, the City adopted an industrial waste ordinance in early 1971 designed to regulate discharges into the sewer system after conducting meaningful studies and consultation with state regulators, substantially prior to adoption of the Clean Water Act and establishment of the EPA. The City's ordinance was supplemented by regulatory orders establishing local limits in 1974, following the guidance provided by the first NPDES permits issued by the state and EPA. The City's industrial waste program predates its permit requirements.

¹⁴ This information is derived from the 1975 annual report for the industrial waste program. This report was not electronically available at the time this letter was sent. The City will provide a copy of it to EPA upon request.

¹⁵ Industrial Waste Division, Report and Recommended Action for Director's Hearing, May 28, 1986.

¹⁶ *Id.*

¹⁷ City and County of San Francisco, Department of Public Works, Order No. 140902, June 25, 1986.

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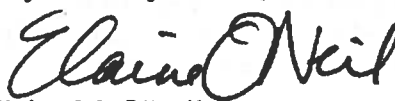
The City published its first master plan to address treatment needs and wet weather discharges in 1971, once again prior to the passage of the Clean Water Act and establishment of EPA. Eight years after adoption of the Act, the statutory basis for technology-based standards for combined sewer system was finally determined (*see Montgomery Environmental Coalition v. Costle*, 46 F.2d 568 (D.C.Cir. 1980)); by this time, the City's construction of its combined sewer controls was well under way. EPA completed promulgation of its CSO Control Policy on April 19, 1994 (59 FR 18688; codified by the Wet Weather Water Quality Act of 2000 (P.L. 106-554)). The first major compliance deadline for combined sewer controls ("the nine minimum controls") was July 1997; by this time, the City had completed its construction program and fully complied with the Policy and the Act by instituting the nine minimum controls and completing its long term control plan.

The City was among the first combined sewer agencies to complete its long term control plan, and to fully comply with the Policy. The reasons for such an achievement were the City's early and effective embrace of the need to address such issues during the 1960s and 1970s and the City's early commitment to provide substantial funds for the construction of the \$1.6 billion program. At the time this program was being implemented, the cost was the highest per capita of any major municipality in the country, and among the highest of any city of any size. EPA's own 2002 report to Congress cites San Francisco's program as a success story (see <http://www.epa.gov/npdes/pubs/csorcexsum.pdf>).

In this context, the PRP Group's recent comments grossly mischaracterize the City's role in managing discharges to the Bay, and unfairly discount the substantial efforts of the residents of San Francisco to protect the environment. We believe that the record clearly demonstrates that the City took "all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all the relevant facts and circumstances."

Very truly yours,

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Elaine M. O'Neil
Deputy City Attorney

Enclosures (2)

cc: Tommy Moala
John Roddy, Esq.